Maximillion Cruises, Inc. *and* Seafarers International Union, AFL–CIO. Case 29–CA–22509

September 14, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On July 2, 1999, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

The judge's remedy is modified as follows: The Respondent shall pay its terminated employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; and (4) the Union's subsequent failure to bargain in good faith, but in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed its Brooklyn, New York facility operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner; provided, however, that in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[1] We shall modify the judge's *Transmarine* remedy language to conform with changes the Board adopted in *Melody Toyota*, 325 NLRB 846 (1998). We shall also modify the judge's recommended Order in accordance with *Indian Hills Care Center*, 321 NLRB 144 (1996). Finally, we shall modify the notice to conform with the recommended Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Maximillion Cruises, Inc., Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Seafarers International Union, AFL–CIO with respect to the effects of its decision to close its Brooklyn, New York facility operations on represented employees in the following unit:

> All full-time and regular part-time Navigational crew, including mates, dock hands, able-bodied seamen, oilers and engineers employed by the Respondent out of its Brooklyn, New York facility, excluding captains, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay to the unit employees limited backpay in the manner set forth in this decision.

(b) On request, bargain collectively with the Union with respect to the effects on the unit employees of its decision to close its Brooklyn, New York facility operations, and reduce to writing any agreement reached as a result of the bargaining.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, mail, at its own expense and after being signed by the Respondent's authorized representative, an exact copy of the attached notice, marked "Appendix,"[2] to the Union and to all former unit employees who were employed when the Respondent closed its Brooklyn, New York facility operations.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Seafarers International Union, AFL–CIO with respect to the effects of our decision to close our Brooklyn, New York facility operations on the following unit of employees:

> All full-time and regular part-time Navigational crew, including mates, dock hands, able-bodied seamen, oilers and engineers employed by us out of our Brooklyn, New York facility, excluding captains, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL pay to the unit employees described above limited backpay in the manner set forth in the Board's decision.

WE WILL, on request, bargain collectively with the Union with respect to the effects on the unit employees of our decision to close our Brooklyn, New York facility operations, and reduce to writing any agreement reached as a result of the bargaining.

MAXIMILLION CRUISES, INC.

Haydee Rosario, Esq., for the General Counsel.
Catherine McVeigh, Esq., for the Respondent.

BENCH DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. The trial was held before me on May 5, 1999, in Brooklyn, New York.

The complaint alleged that following a Board election and certification, Respondent Maximillion Cruises, Inc. refused to meet with and bargain with the Seafarers International Union (the Union), in violation of Section 8(a)(1) and (5) of the Act. Based on counsel for Respondent's admission that Respondent had terminated its business operation on or about September 30, 1998, counsel for the General Counsel moved to amend its complaint to include an allegation that since such termination, Respondent has refused to bargain with the Union concerning the effects of such termination. Counsel for Respondent did not object to the amendment, and such amendment was granted.

Based on the entire record in this case, my observation of the demeanor of the single witness presented by the General Counsel, and on the oral argument by the General Counsel, I make the following findings of fact, and conclusions of law.[1]

Respondent, is a Florida corporation, with its principle office and place of business located in Fort Lauderdale, Florida, and another place of business located in Brooklyn, New York (the Brooklyn facility), has been engaged in the business of operating a gambling boat. Respondent annually, in the course of its business operations, derives gross revenues in excess of $500,000. Respondent annually purchases and receives at its' Brooklyn facility food, liquor, and other supplies for its gambling business valued at in excess of $500,000 directly from enterprises located outside the State of New York.

I find that Respondent is an employer engaged in business within the meaning of Section 2(2), (6), and (7) of the Act.[2]

It is admitted and I find that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

On August 28, 1998, the Union filed a petition for certification of representative in Case 20–RC–9103, seeking of a unit of employees, described below. On September 25, 1998, an election was conducted and on October 21, 1998, the Union was certified as the exclusive collective-bargaining representative of:

> All full-time and regular part-time Navigational crew, including mates, dock hands, able-bodied seamen, oilers and engineers, employed by the employer out of its Brooklyn facility, excluding captains, guards and supervisors as defined in Section 2(11) of the Act.

On December 1, 1998, David Ross, Respondent's president, met with Jack Caffey, Union's vice president, to discuss terms for a collective-bargaining agreement. Caffey gave Ross written proposals for a collective-bargaining agreement. Ross did not submit any counterproposals. Ross did not inform Caffey that he intended to, or had ceased doing business.

Thereafter, by telephone calls and by a letter dated December 15, 1998, the Union attempted to contact Ross to arrange for further meetings. Ross has failed to respond.

The evidence establishes that Respondent had discontinued its operation prior to meeting with the Union on December 1, and failed to disclose this to the Union. Moreover, notwithstanding further requests by the Union to bargain, Respondent refused to reply to such requests or to notify the Union that it had discontinued its operation. By engaging in such conduct, I find that Respondent violated Section 8(a)(1) and (5) of the Act. *Sea Jet Trucking Corp.,* 327 NLRB 540 (1999); *Transmarine Navigation Corp.,* 170 NLRB 389 (1968).

Accordingly, I shall recommend that Respondent be ordered to bargain with the Union, on request, about the effects upon employees in the unit set forth above, and to pay these employ-

[1] Counsel for Respondent declined to make an oral argument. Counsel for the General Counsel and counsel for Respondent waived the filing of briefs.

[2] Counsel for the Respondent did not admit to the conclusion of the Board's jurisdiction, however, in view of the Board's certification, described below, I conclude Respondent is an employer as defined in the Act. *Spring Valley Farms, Inc.,* 274 NLRB 643, 644 (1985).

ees amounts at the rate of their normal wages when last in Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains for agreement with the Union on those subjects pertaining to the effects of the closing of its business operations at its Brooklyn facility; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this decision, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last employed by Respondent.

[Recommended Order omitted from publication.]

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